IN THE

Supreme Court of the United States.

OCTOBER TERM, 1927.

No. 493.

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL AND FRANCES RICHARD BROWN, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

No. 532.

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK, EDWARD ERICKSON, WILLIAM P. SMITH, DAVID TROTSKY, LOUIS O. GILLIAM, CLYDE THOMPSON AND BERNARD WARD, PETITIONERS,

vs.

UNITED STATES OF AMERICA.

No. 533.

EDWARD H. MCINNIS, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Petitioners Edward H. McInnis, Charles S. Green, Emory A. Kern, Z. J. Hedrick, Edward Erickson, William P. Smith.

Opinions of the Lower Courts.

Three opinions were rendered by the District Court. On the first [illegible] to strike [illegible] (R. 102; 7 F. (2d) 736) the second [illegible] (R. 123; 21 F. (2d) 712) and the third [illegible] (R. 223; 7 F. (2d) 760). The opinions of the Circuit Court of Appeals (R. 237, 332 and 341) are reported in 19 F. (2d) at pages 842 and 843 respectively and dissenting opinion in F. (2d) 848.

Jurisdiction.

Judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered on May 9, 1927. (R. 236.) A petition for rehearing was filed September 9, 1927, and denied November 28, 1927. A petition for rehearing en banc was also filed September 9, 1927, and denied December 17, 1927, and granted January 9, 1928. Jurisdiction is conferred by section [illegible] and it is urged that the judgment of the court below is reviewable upon writ of certiorari under section [illegible] of the Judicial Code as amended by the Act of February 13, 1925.

The claims of error and the rulings made in the lower courts which are relied upon as the basis for this court's jurisdiction are: That the admission of evidence on a motion to suppress over the objections of the defendants of the testimony of Federal officers as to telephone conversations between the defendants and overheard by such Federal officers over the private telephone lines of the defendants tapped by the Federal officers is a violation of the rights guaranteed the defendants by the Fourth and Fifth Amendments to the Constitution of the United States. (R. 281, 282, 294, 324, 332, 392.)

Statement of the Case.

In allowing the writ of certiorari this court limited its review to the question above set forth. It is unnecessary, therefore, to give a detailed statement of the evidence disclosed by the record. The facts sufficient for the understanding of the question involved may be briefly stated as follows. The petitioners were indicted with about eighty other defendants for conspiracy (Sec. 37 Penal Code) to violate the National Prohibition Act (Act of October 28, 1919). The principal evidence offered against the defendants was given by Federal Prohibition Agents relating to alleged conversations learned by them over telephone lines tapped by the defendants. By means of tapping the defendants' telephone lines, (Most of the wire tapping, if not all, was done by Federal Prohibition Agent Richard Bryant pursuant to instructions of Assistant Prohibition Administrator William Whittier. For a period of several weeks certain agents listened in over the tapped wires and made notes of the conversations overheard and later revised and extended these notes. These notes were turned over to Mrs. Whittney, wife of the presiding agent, and were typewritten. They were again revised by the agents as well as by Mr. Whittney himself, and were again rewritten. Both the first and secondary notes were destroyed.) All the evidence relating to the conversations heard by the government agents over the tapped telephone wires was admitted by the trial court over the repeated objections of the defendants that such evidence was obtained in violation of the constitutional rights of the defendants under the Fourth and Fifth Amendments to the Constitution.

Error.

In view of the limited review granted by this court upon the writ of certiorari the only error to be assigned for consideration is the admission of evidence over the defendants' objections of alleged telephone conversations heard by government agents over the private telephone

lines of the defendants by means of secretly tapping such wires in violation of the rights of the defendants under the Fourth and Fifth Amendments.

ARGUMENT.

Federal agents secretly tapped the private telephone lines of the defendants, intercepted the private messages and conversations of the defendants, and were permitted, over the objections of defendants, to testify concerning such messages and conversations. The sole question presented here is whether the obtaining of evidence in this manner is a violation of the rights guaranteed under the Fourth and Fifth Amendments to the Constitution of the United States. This question does not appear to have been heretofore considered by this court or any other court of record. Since it is a question of first impression it is necessary to consider the facts of this case in the light of the expressions of this Honorable Court upon the general question of searches and seizures prohibited by the Fourth and Fifth Amendments.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated.

The provisions of the Fifth Amendment here involved are:

> No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law.

This Court has held that these two amendments were inspired by the same abuses preceding the adoption of the Constitution, and that they must be liberally construed in favor of the citizen and his liberty, and that stealthy en-

encachments upon the rights guaranteed by them will not be tolerated. (Boyd vs. United States, 116 U. S. 616.)

The majority opinion of the Circuit Court of Appeals for the Ninth Circuit places a narrow construction upon the rights protected by these amendments, declaring that "the purpose of the amendments is to prevent the invasion of homes and offices and seizure of incriminating evidence found therein." The majority opinion of the Court concedes that the tapping of the defendants' telephone wires is an "*unethical intrusion on the privacies of persons* who are suspected of crime," but holds that "*it is not an act which comes within the letter of the prohibition of constitutional provisions.*" (R. 560.)

The foregoing declarations of the Circuit Court are directly contrary to the holdings of this Court. In *Ex Parte* Jackson, 96 U. S. 727, this Court did not limit the applications of the amendments to the "*invasion of homes and offices.*" Neither has this court limited the application of these amendments to the "letter" of the same. On the contrary, the underlying thought in each decision of this court effecting these amendments has been to apply the "spirit" of the same. In the *Boyd* case this Court declares that these principles apply to all invasions on the part of the Government and its employes of the security of a man's home *and the privacies of life.*

The conception of this Court as to the protection afforded the citizen by the Fourth and Fifth Amendments is fully and clearly defined in the case of Boyd vs. United States, supra, a careful analysis of which case shows that in fact no search and no seizure were involved if the words "search and seizure" be given their literal meaning. In that case, which involved the forfeiture of certain goods alleged to have been imported in violation of the customs laws, the court issued a notice to the claimants of said goods requiring the claimants to produce a certain invoice of a previous importation. This notice was issued pursuant to an act of Congress which authorized the issuance of the same upon motion of the Government attorney, and the penalty pro-

scribed by the act of Congress for non-compliance with the notice was that the allegations of the Government attorney as to that which the invoice or paper contained would be taken as confessed. Boyd produced the paper under protest and the court held that the right of the claimants under the Fourth and Fifth Amendments had been violated.

It is apparent that no search was involved or contemplated in that case. It is also apparent that no actual seizure was involved, as the claimant was not required to part with the possession and custody of the paper, but was only required to produce it in court for inspection. The Court in its decision admitted in effect that no actual search and no actual seizure were involved, but held that the result was the same as if an actual search and an actual seizure were made. In this connection the Court said:

> But in regard to the Fourth Amendment it is contended that whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so, but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating accidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting . . . but it accomplishes the substantial object of those acts in forcing from the party evidence against himself. It is our opinion, therefore, that the compulsory seizure of a man's private papers to establish a crime charged against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution; in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure. (Italics ours.)

By the foregoing language this Court definitely established that it is not the mere form and substance of the acts of government agents which determines whether the search and seizure are in violation of the constitutional provisions, but it is the results accomplished by such acts. If such acts effect the sole object and purpose of search and seizure then they come within the inhibition of the Fourth and Fifth Amendments.

In the case at bar, the sole object of the government agents was to obtain evidence relating to transactions in liquor by the defendants. The conversations heard over the telephone was of evidential value only. It is no crime to exchange messages relating to the possession and sale of liquor. The crime is to possess and sell liquor, and conversations concerning the possession or sale are only admissible when the liquor which is possessed or sold is seized. Suppose that the messages relating to the possession and sale of the liquor had been sent by letter. No warrant to search the homes, offices or persons of the defendants for such letter could have been obtained. Gouled vs. United States, 255 U. S. 298, 300. Likewise, no valid search warrant could be obtained by government agents to tap the telephone lines of the defendants for the purpose of securing evidence of the private messages and conversations relating to the possession or sale of liquor. Such messages, whether transmitted by letter or telephone, are of evidential value only, and lawful searches for such evidence can not be made under the decision in the Gouled case. However, to again quote the language of the Boyd case, the sole object and purpose of search and seizure were effected as completely by tapping the wires, listening to the messages and testifying to them, as if the government agents had entered the homes of the defendants and seized letters or papers containing exactly the same messages.

Furthermore, the admission of the evidence of government agents as to the messages transmitted over the telephone wires compelled the defendants to give evidence against themselves just as effectively as if they had been

forced to take the witness stand and themselves testify as to the messages sent over the telephone; yea, just as effectively as if the defendants had been required to produce in court private messages sent by letter of exactly the same import as the messages sent by phone. The result is to compel the defendants to become the unwilling source of evidence to convict them of crime which the court in the *Boyd* case held to be a violation of the defendants' rights under the Fifth Amendment.

In declaring the underlying principles of the Fourth and Fifth Amendment this Court has constantly kept in mind the causes for their adoption. In Byers vs. United States, ... U. S. ..., the court states:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies, and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

Again, in the case of Boyd vs. United States, supra, the court recites the historical facts leading up to the adoption of these amendments and declares that the opinion of Lord Camden must have been considered by the framers of the two amendments "as sufficiently explanatory of what was meant by unreasonable search and seizure." The invasions prohibited by the Fourth and Fifth Amendments are defined by the court as follows:

> "The principles laid down in this opinion (referring to Lord Camden's opinion) affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees of the security of a man's home *and the privacies of life*. It is not the breaking of his doors and the rummaging of his

drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible *right of personal security*, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—*it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.* Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony* or of his private papers *to be used as evidence to convict him of crime* or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (Italics ours.)

What constitutes "an invasion of the privacies of life" within the meaning of the foregoing language of this court? It would indeed be difficult to attempt to enumerate all of those things coming within the phrase "the privacies of life," but it would be equally difficult to suggest any more sacred or any greater *privacy of life* under present conditions than that of using a private telephone line for transmitting private and confidential communications to one's family and business associates. What greater invasion of this privacy of life could be contemplated than to have one's private and confidential communications intercepted and overheard by promiscuous government agents by means of secretly tapping one's telephone? The telephone as a means of communication was not known to the world at the time of Lord Camden's judgment, or at the time of the adoption of the Fourth and Fifth Amendments, or even at the time of the decision of this Court in the *Boyd* case. The only means of communication at that time was by letter, and the right to transmit a secret message in a letter without having the same intercepted and read by government agents was declared by this Court in no uncertain language in the case of Ex Parte Jackson. The application of this case to the

present inquiry was pointed out by Justice Rudkin in his dissenting opinion in the following language:

> "In discussing the protection that surrounds a letter deposited in the mail in *Ex parte* Jackson, 96 U. S. 727, 733, Mr. Justice Field said:
>
> "'Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers thus closed against inspection wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.
>
> "And, it is the contents of the letter, not the mere paper that is thus protected. What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed, but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires in order that it may be used against him. Such a situation would be deplorable and intolerable to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages inter-

> rupted and intercepted in this way? Must their personal, private and confidential communication to family, friends and business associates pass through any such scrutiny on the part of agents, in whose selection they have no choice, and for the faithful performance of whose duties they have no security? Agents, whose very names and official stations are in many instances concealed and kept from them. If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a Government to secure the blessings of liberty to themselves and their posterity."

As pointed out by Judge Rodkin in the foregoing language it is not the paper which is protected by the constitutional inhibitions against unreasonable searches and seizures, but it is the message contained in the letter. In the same manner any message transmitted by telephone or telegraph should be protected. The interpretation of the language of the Fourth and Fifth Amendments should be sufficiently liberal and elastic to apply the principles laid down by the Court in the *Boyd* case to the conditions existing under the advancement in social and business intercourse as affected by modern inventions. That this is the true criterion is declared by the Court in Village of Euclid vs. Nedder Realty Co., 272 U. S. 365 as follows:

> "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

The telephones used by the defendants were theirs against all the world, even against the telephone company while their tolls were paid. The telephone lines leading to the defendants' houses and offices, as well as the telephone equipment in the houses and offices, were the private property of the defendants. They had the right to the exclusive use and enjoyment of same, except the license given by them to

connect other lines with their lines for the purpose of receiving incoming calls. When the government agents tapped the defendants' telephone lines they committed a trespass upon the property rights of the defendants. The effect of this trespass was to project themselves into the houses and offices of the defendants with the same result as if they had broken through the window or door of the defendants houses and secretly seized a letter containing the identical message that was transmitted over the phone. The result was not only an unlawful search for evidence but an unlawful seizure by means of which the defendants, in effect, were compelled to testify against themselves. As stated by Judge Rudkin, those who use the telephone are not broadcasting to the world. Under modern conditions the telephone has, to a large extent, supplanted the mails as a means of transmitting private messages. It has become indispensable to every home and office. If the stamp of approval is put upon the action of Government agents in seeking and obtaining evidence against those suspected of crime by means of tapping private telephone lines, the door is opened wide for the great mass of citizens using the telephone for lawful purposes to have their private and confidential communications relating to business and family, subjected to the scrutiny of government agents. Such a system of espionage would become unbearable and deplorable. It would deprive the citizenship of the country of the personal security and the enjoyment of the privacies of life guaranteed by the Constitution, and subject them to an espionage unequalled by the conditions prevailing under the King's officers prior to the Revolution.

Respectfully submitted,

FRANK R. JEFFERY,

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Seattle, Washington.

Nos. 493, 532, and 533

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v.

UNITED STATES OF AMERICA

CHARLES S. GREEN, EMORY A. KERN, E. J. HEDRICK, EDWARD ERICKSON, WILLIAM P. SMITH, DAVID TROTSKY, LOUIS O. GILLIAM, CLYDE THOMPSON AND BERNARD WARD, *Petitioners*

v.

UNITED STATES OF AMERICA

EDWARD H. McINNIS, *Petitioner*

v.

UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITIONERS' CONTENTION.

Filed by leave of court by the undersigned counsel, amici curiae, in behalf of The Pacific Telephone and Telegraph Company, American Telephone and Telegraph Company, United States Independent Telephone Association and Tri-State Telephone and Telegraph Company

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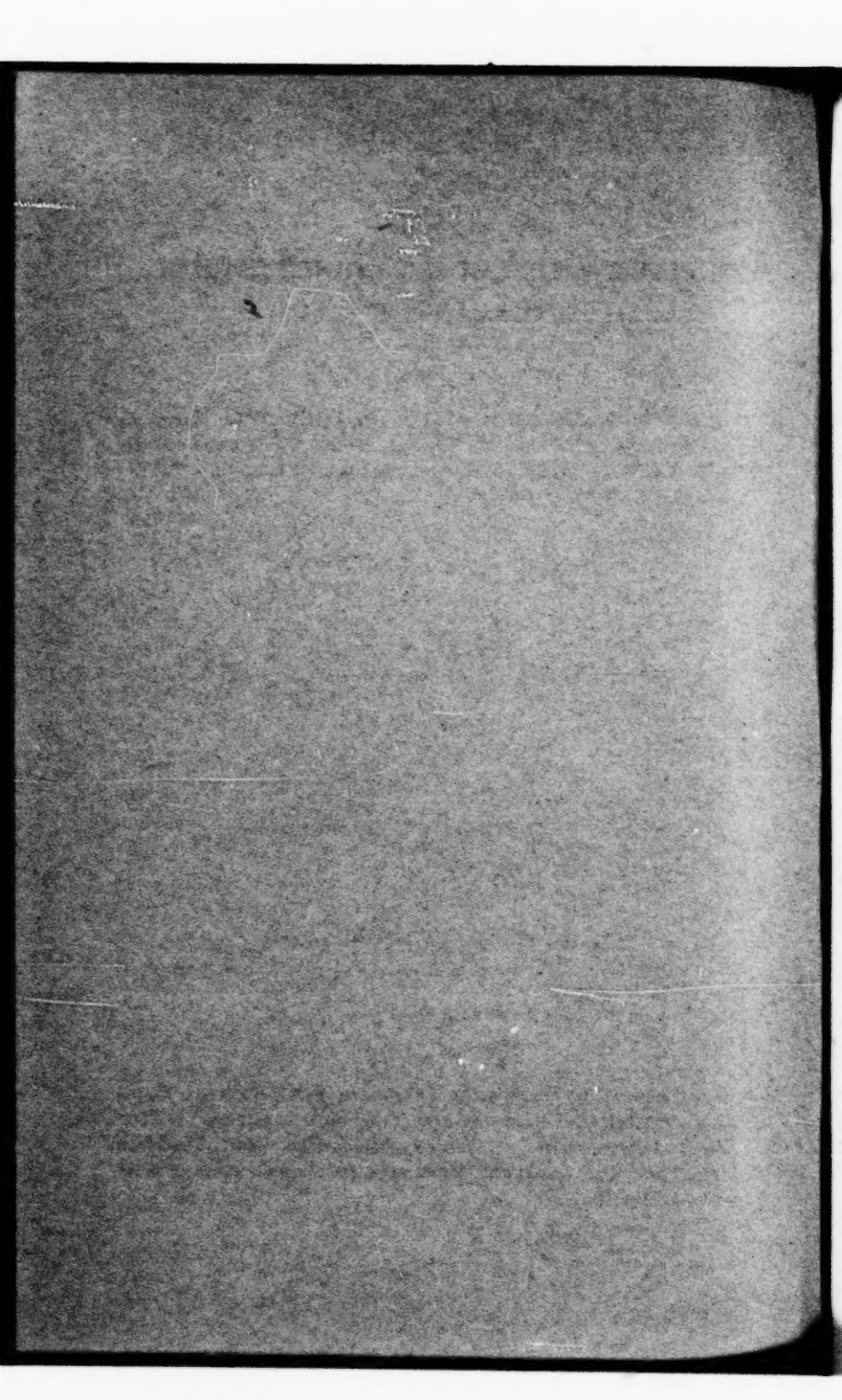

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UNITED STATES OF AMERICA

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EDWARD H. McINNIS, *Petitioner*

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UNITED STATES OF AMERICA

Motion of counsel for The Pacific Telephone and Telegraph Company, American Telephone and Telegraph Company, United States Independent Telephone Association, and Tri-State Telephone and Telegraph Company, for leave to file a brief as amici curiae

Now come Otto B. Rupp, Counsel for The Pacific Telephone and Telegraph Company, Charles M. Bracelen and Robert H. Strahan, Counsel for American Telephone and Telegraph Company, and Clarence B. Randall, Counsel for United States Independent Telephone Association and Tri-State Telephone and Telegraph Company, and respectfully move for leave to file a brief in the above entitled causes, as *amici curiae*, in support of the contention of petitioners.

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No. 533

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v.

UNITED STATES OF AMERICA

BRIEF OF COUNSEL, AMICI CURIAE, FILED BY LEAVE OF COURT, IN BEHALF OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, THE UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, IN SUPPORT OF THE PETITIONERS' CONTENTION.

Federal prohibition agents secretly tapped the telephone lines of petitioners, and overheard and made a written record of private conversations between them, which were received in evidence and led to the indictment and conviction of petitioners for conspiring to violate the National Prohibition Act. The petitioners claimed the protection of the Fourth and Fifth Amendments, and this court has granted certiorari to review the action of the district and circuit courts in receiving the evidence.

In its order granting the petitions for certiorari this court has limited its consideration to the question—

> "Whether the use of evidence of private telephone conversations, between the defendants and others, intercepted by means of wire tapping, is a violation of the Fourth and Fifth Amendments and, therefore, not permissible in the federal courts."

In view of the able briefs filed by counsel for the parties, we limit our discussion to the following suggestions.

Argument.

It is said that there is no precedent to support the petitioners' contention. That there is no authoritative case on all fours, nor any case that in its adventitious circumstances closely resembles the facts of this case, is true. There is, however, more in the opinions of courts than their bare recital of facts, and the decision of the cases. The grounds of decision, the statement and exposition of the enduring principles of law which they set forth, are what give them life and vigor and make them valuable as prece-

dents. So regarded the several decisions of this court that are relied upon and discussed in the briefs of counsel for the petitioners are believed to be in point and to sustain their contention.

Ex parte Jackson, 96 U. S. 727;
Boyd v. *United States*, 116 U. S. 616;
Weeks v. *United States*, 232 U. S. 383;
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385;
Gouled v. *United States*, 255 U. S. 298;
Agnello v. *United States*, 269 U. S. 20;
Byars v. *United States*, 273 U. S. 28.

In these cases the court has held that the Fourth and Fifth Amendments are designed to protect the people in the privacies of life, and in the indefeasible, sacred right of personal security and personal liberty (the *Boyd*, *Weeks* and other cases). The invasion of these rights secretly and by stealth is within the condemnation of these amendments, no less than invasion accomplished by force (*Gouled* case). It is not necessary, in order to constitute a violation of the Fourth Amendment, that there be any entry into the house or office of the person, (*Ex parte Jackson*) or that there be a "search" or a "seizure" in any exact or literal sense of the words, (the *Boyd* case; see also *Perlman* v. *U. S.*, 247 U. S. 7). And evidence secured by federal agents in ways that violate the Fourth Amendment is inadmissible under the Fifth Amendment.

The petitioners were using the telephone lines and facilities of the local telephone company, such as were available to everyone without discrimination. *The function of a telephone system in our modern economy is, so far as*

reasonably practicable, to enable any two persons at a distance to converse privately with each other as they might do if both were personally present in the privacy of the home or office of either one. When the lines of two "parties" are connected at the central office, they are intended to be devoted to the exclusive use, and in that sense to be turned over to the exclusive possession, of the parties. A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well. *International News Service* v. *Associated Press*, 248 U. S. 215.

It is of the very nature of the telephone service that it shall be private; and hence it is that wire tapping has been made an offense punishable either as a felony or misdemeanor by the legislatures of twenty eight states, and that in thirty five states there are statutes in some form intended to prevent the disclosure of telephone or telegraph messages, either by connivance with agents of the companies or otherwise.*

The wire tapper destroys this privacy. He invades the "person" of the citizen, and his "house", secretly and without warrant. Having regard to the substance of

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*We append a list of these statutes, Appendix A, in which we include also certain federal statutes.

We do not mean to suggest that the states can by statute destroy or impair any authority federal officers have under the Constitution and laws of the United States, and thus tie the hands of the Federal Government. Our suggestion is that this general and widespread recognition by the states of the privacy of the telephone lends most persuasive support to the contention that it is one of the privacies of life which the Fourth Amendment protects against invasion by the Government of the United States, and that any search which invades the privacy of the telephone is an unreasonable search and therefore violates that amendment.

things, he would not do this more truly if he secreted himself in the home of the citizen.

In view of what this court has held as to the intent and scope of the Fourth and Fifth Amendments, it would not seem necessary to enter into any meticulous examination of their precise words. But if that be done, does not wire tapping involve an "unreasonable search", of the "house" and of the "person"? There is of course no search warrant, as in the nature of the case there could not be. If the agent should secrete himself in the house or office to examine documents, would not that constitute a "search"? Is the case any different in the eyes of the law if from a distance the agent physically enters upon the property of the citizen, as he does when he taps the wire, and from that point projects himself into the house? Certainly in its practical aspect the latter case is worse than the first, because the citizen is utterly helpless to detect the espionage to which he is subjected.

If it be said that, in any event, there is no "seizure", that an oral conversation cannot be seized, we answer, in the first place, that this is a purely superficial view, which puts the letter above the spirit and intent of the law. The "privacy of life" and the liberty of the citizen have been invaded. And, in the second place, we do not understand that seizure is a necessary element to constitute the offense. An unreasonable search alone violates the Fourth Amendment. It is enough that the federal officer has made an unreasonable search, within the meaning of the Fourth Amendment, and has thereby unlawfully *obtained* evidence. The evidence so obtained is excluded under the provisions of the Fifth Amendment.

Suppose the agent, having no search warrant, were to enter a man's home by stealth, and in his absence search for and find there among his papers an incriminating letter written by him, and should merely read the letter and make some such record of its contents as was made of the contents of the communications overheard by these wire tappers. This hypothetical case and the wire tapping case are alike in that (1) the agent was searching for evidence, (2) he gained knowledge of incriminating statements made by the accused, (3) he had no search warrant, (4) he accomplished his purpose by stealth, (5) he made no "seizure" in the literal meaning of the word, and (6) the statements of the accused were extorted from him and used to obtain his conviction of a crime. They are unlike in that (1) one communication is written and the other oral or, if you please, one has been impressed upon paper to be dispatched by mail, and the other has been impressed upon an electric current to be dispatched to its destination by a wire. The Government itself provides the mail service, a public service, and *the Government authorizes the telephone company to provide the telephone service, also a public service.* It is settled that the communication in the mail is protected (*Ex parte Jackson*). Upon what reason, then, can it be said that the communication by telephone is not protected?

The cases are also unlike in that (2) in the hypothetical case the agent in person physically trespasses upon the house and searches with his eyes, while in the wire tapping case he physically trespasses upon the telephone line, which enters the house, and searches with his ears.

As Judge Rudkin states the matter in his vigorous and able dissenting opinion (Record 588, 594):

> "True the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed, but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instruments employed will permit, and no federal officer or federal agent has a right to take his message from the wires in order that it may be used against him."

It will be observed that whenever a telephone line is tapped the privacy of the persons at both ends of the line is invaded, and all conversations between them upon whatever subjects, however proper, confidential and privileged they may be, are overheard. Not only that, but the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. There are in the United States more than eighteen million telephones interconnected in and with the Bell System, so that any one of them can be connected with any other at any time. Daily there are many times that number of telephone conversations over these lines. These figures take no account of the telephone service available to each one of these telephones for communication to Canada, Cuba, Great Britain, continental Europe and Mexico. The telephone has become part and parcel of the social and business intercourse of the people of the United States, and this telephone system offers a

means of espionage compared to which general warrants and writs of assistance were the puniest instruments of tyranny and oppression.

The telephone companies deplore the use of their facilities in furtherance of any criminal or wrongful enterprise. But it was not solicitude for law breakers that caused the people of the United States to ordain the Fourth and Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by *tapping wires of a public telephone system* is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful. Writs of assistance might have been abolished by statute, but the people were wise to abolish them by the Bill of Rights.

> "We said in *Boyd* v. *United States*, 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of

his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' "

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447.

Respectfully submitted,

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APPENDIX A.

State Statutes in effect January 1st, 1928, making wire tapping an offense punishable either as a felony or misdemeanor.

State.	*Reference to Statute.*
Alabama	Code (1923), Sec. 5256.
Arizona	Penal Code, Title 19, Sec. 692.
Arkansas	Crawford & Moses Digest (1921), Chapter 171, Sec. 10246.
California	Penal Code, Sec. 639-40.
†Colorado	Compiled Laws (1921), Sec. 6969.
Connecticut	Gen. Stats. (Rev. of 1918), Sec. 6292.
†Idaho	Compiled Stats. (1919), Sec. 8586.
Illinois	Laws 1927, p. 868, Sec. 1.
Iowa	Code (1927), Sec. 13121.
Kansas	Rev. Stats. (1923), Ch. 17, Sec. 1908.
Michigan	Comp. Laws (1915), Ch. 257, Sec. 15403.
oMinnesota	Gen. Stats. (1923), Ch. 101, Sec. 10433.
†Montana	Penal Code (1921), Sec. 11518.
Nebraska	Comp. Stats. (1922), Ch. 67, Art. III, Sec. 7115.
Nevada	Rev. Laws (1912), Sec. 4632, 6751.
New York	Penal Law, Sec. 1423.
North Dakota	Rev. Codes (1905), Chap. 72, Sec. 9426.
Ohio	Gen. Code, Title I, Ch. 20, Sec. 13402.
Oklahoma	Comp. Stats. (Supp. 1926), Ch. 6, Art. LXI, Sec. 2229.
†Oregon	Laws 1920, Tit. XIX, Sec. 2265.
†Rhode Island	Gen. Laws 1923, Title XXIX, Ch. 397, Sec. 6104.

†Statute refers in terms to telegraphic messages only.
oRefers to *interference* with any telephone instrument or apparatus.

State.	*Reference to Statute.*
South Dakota	Rev. Codes (1919), Ch. 15, Sec. 4312.
Tennessee	Thompson's Shannon's Code (1917), Sec. 1839-40; Laws 1921, Chap. 59, p. 88.
Utah	Comp. Laws (1917), Sec. 8432-33.
Virginia	Gen. Laws (1923), Sec. 4477.
Washington	Remington's Comp. Stats. (1922), Sec. 2656 (18).
Wisconsin	Stats. (1923), Chap. 348, Sec. 4558.
Wyoming	Comp. Stats. (1920), Ch. 452, Sec. 7148.

State Statutes in effect Jan. 1st, 1928, making disclosure of telephone or telegraph messages a penal offense, either through connivance with agents of the telephone or telegraph company, or otherwise.

State.	*Reference to Statute.*
Alabama	Code (1923), Sec. 5256.
Arizona	Penal Code, Sec. 690-1.
Arkansas	Crawford & Moses Digest (1921), Chap. 171, Sec. 10250.
California	*Penal Code, Sec. 619, 641.
†Colorado	Comp. Laws (1921), Sec. 6966, 6970.
Connecticut	Gen. Stats. (Rev. of 1918), Sec. 6292.
Florida	Rev. Gen. Stats. (1920), Sec. 5755.
†Idaho	Comp. Stats. (1919), Sec. 8568.
Illinois	Rev. Stats. (1925), Ch. 134, Sec. 8.
Indiana	*Burns Ann. Stats. 1926, Sec. 2862.
†Louisiana	*Cons. & Stats. (1920), p. 2175.
*Maine	Rev. Stats. (1916), Ch. 60, Sec. 24, p. 991.
Maryland	Ann. Code (1924), Art. 27, Sec. 489.
Michigan	Comp. Laws (1915), Ch. 168, Sec. 8781, Ch. 253, Sec. 15104.

*Statute contains a proviso that message may be divulged under order of a court of justice or other lawful authority.

†Statute refers in terms to telegraphic messages only.

State.	*Reference to Statute.*
Minnesota	Gen. Stats. (1923) Ch. 101, Sec. 10423.
†Mississippi	Hemingway's Ann. Code (1927), Sec. 1174.
Missouri	*Rev. Stats. (1919), Secs. 3605, 10140.
†Montana	Penal Code (1921), Sec. 11194-6.
Nebraska	Comp. Stats. (1922), Ch. 67, Art. II, Sec. 7088.
†Nevada	Rev. Laws (1912), Sec. 4603-5, Sec. 6713.
New Jersey	Comp. Stats., Vol. 4, p. 5319-20, Sec. 12-13.
New York	*Penal Law, Sec. 552.
North Carolina	Cons. Stats. (1919), Art. 46, Sec. 4497.
†North Dakota	*Rev. Codes (1905), Sec. 9343.
Ohio	Gen. Code, Title I, Ch. 20, Sec. 13419.
Oklahoma	Comp. Stats. (Supp. 1926), Ch. 6, Art. LXI, Sec. 2256.
†Oregon	Laws (1920), Title XIX, Secs. 2260, 2266.
Pennsylvania	Pa. Stats. (1921), Sec. 6308, p. 596.
†Rhode Island	Gen. Laws (1923), Title XXXIX, Ch. 397, Sec. 6104.
South Dakota	Rev. Codes (1919), Sec. 4346, Sec. 9801.
Tennessee	Thompson's Shannon's Code (1917), Sec. 1837-38.
Utah	Comp. Laws (1917), Sec. 8403-5, 8434.
Virginia	Gen. Laws (1923), Sec. 4477.
†Washington	Remington's Comp. Stats. (1922), Sec. 2662.
Wisconsin	Stats. (1923), Ch. 348, Sec. 4557-4557a.

*Statute contains a proviso that message may be divulged under order of a court of justice or other lawful authority.

†Statute refers in terms to telegraphic messages only.

Federal Statutes.

Act of Congress passed October 29, 1918 (40 Stat. L. 1017), entitled "An Act providing for the protection of the users of telephone and telegraph service and the property and funds belonging thereto during the Government operation and control," as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whoever during the period of governmental operation of the telephone and telegraph systems of the United States by the Postmaster General, under the Act of Congress approved July sixteenth, nineteen hundred and eighteen, and the proclamation of the President dated July twenty-second, nineteen hundred and eighteen, shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or wilfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both. * * *"

Federal control of telephone lines terminated on July 31, 1919, pursuant to Act of Congress of July 11, 1919 (41 Stat. L. 137).

Act of Congress passed February 23, 1927 (Radio Act, 44 Stat. L. 1162), as follows:

"* * * SEC. 27. No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress."

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In the

Supreme Court of the United States

OCTOBER TERM, 1927

No.

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL and FRANCIS RICHARD BROWN,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Certiorari from the United States Circuit Court of Appeals for the Ninth Circuit

Reply Brief of Plaintiffs in Error

SUPPLEMENTAL STATEMENT OF THE CASE

The plaintiffs in error were indicted with others in the United States District Court for the Western District of Washington, Northern Division, January 19th, 1925, for a conspiracy to violate the National Prohibition Act (R. 1-44), and convicted on said charge February 20th, 1926 (R. 250-5; 259-268), and

a writ of error was sued out from the United States Circuit Court of Appeals for the Ninth Circuit, where the conviction was affirmed on May 9th, 1927 (R. 756-772), Judge Rudkin dissenting (R. 772-9). A rehearing was denied July 18th, 1927 (R. 781), and, on a petition to this court, an order was entered on January 9, 1928, granting the petition of the plaintiffs in error for a writ of certiorari and directing the record to be certified to this court for a hearing on the merits as to the admissibility in evidence of certain conversations secured by Government agents by "tapping" the private telephone wires of the plaintiffs in error.

The record shows that before trial in the lower court the plaintiffs in error Olmstead and Finch petitioned that court to suppress certain evidence that had been obtained by Federal prohibition agents "tapping" the telephone wire leading into his home and listening in to conversations over such wire, upon the ground that such evidence was obtained in violation of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 172, pa. 17, R. 213, pa. 12). These petitions were considered and denied and exceptions duly taken, allowed and entered. (R. 223; 233; 236.)

Upon the trial, over the objections and exceptions of the plaintiffs in error, evidence to establish the charge in the indictment was introduced of conversations passing over such telephone wires and also over a telephone wire designated in the record as Eliot 6585, which was the telephone of all of the plaintiffs in error except Jerry L. Finch (R. 433; 527; 590; 615; 633; 640; 644).

Error was assigned upon these rulings (R. 333; 336). The Circuit Court of Appeals affirmed the ruling (R. 768), Judge Rudkin dissenting (R. 775). *Olmstead v. U. S.*, 19 Fed. (2nd), 842 (C. C. A.)

ARGUMENT

I.

The principles controlling this case were first announced by this court in the case of *Boyd v. United States*, 116 U. S. 616. These principles have never been deviated from but have been reiterated again and again by this court in a series of cases, the last of which is *Byars v. United States*, 47 Sup. Ct. Rep. 248 (not officially reported).

In the *Boyd* case this court said:

"The principles laid down in this (Lord Camden's) opinion affect the very essence of constitutional liberty and security. They reach farther than the con-

crete form of the case then before the court, with its adventitious *circumstances; they apply to all invasions, on the part of the government and its employes, of the sanctity of a man's home and the privacies of life.* It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of *personal security, personal liberty and private property,* where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camblden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation, but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. (Italics ours.)

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights

of the citizen, and against any stealthy encroachments thereon."

In *Gouled v. United States*, 255 U. S. 298, 65 L. Ed. 647, the court said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915 C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319), have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property,' that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers."

And in the *Byars* case the court ended its opinion with these words:

"The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

The admissibility of this "wire tapping" testimony is sanctioned by the majority opinion as follows:

"It was further ruled that the petition to suppress evidence obtained by tapping the telephone wires be denied. It is contended that by the latter ruling the defendants' rights under the Fourth and Fifth Amendments to the Constitution were violated. The protection of those amendments, however, has never been extended to the exclusion of evidence obtained by listening to the conversation of persons at any place or under any circumstances. The purpose of the amendments is to prevent the invasion of homes and offices and the seizure of incriminating evidence found therein. Whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of crime, it is not an act which comes within the letter of the prohibition of constitutional provisions."

II.

In the brief of the defendant in error and in the opinion of the Circuit Court of Appeals it is urged as controlling that the illegality of the method by which evidence is obtained, does not affect its admissibility. To a limited extent this is true. If incriminating evidence is secured by means of trickery, subterfuge, trespass or fraud, and after it has been so secured, finds its way into the hands of government officials, no legal ground can be urged against its introduction in evidence, for the reason that no constitutional question is involved. If, however, the fraud, subterfuge, trespass or theft is perpetrated by government officials, or if a government official participates directly or indirectly therein, the evidence thus secured is not admissible for the reason that it was secured in a manner which violates the provisions of the Fourth and Fifth Amendments to the Constitution of the United States. This is a distinction which the lower court seems to have lost sight of, although clearly drawn by this court.

In the case of *Byars v. United States, supra*, it was said on the subject:

"We do not question the right of the Federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the Federal

government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional provisions intended to secure the people against unauthorized official action. The Fourth Amendment was adopted in view of a long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially may seem to escape the challenge of illegality, but which in reality strike at the substance of the constitutional right."

In a late case from a lower Federal court, *United States v. Mandel*, 17 Fed. Rep. (2nd) 270, the distinction which we are contending for is emphasized, as follows:

"It is an old and familiar rule that evidence otherwise competent will not be excluded because it may have been obtained by unlawful means. Bishop Atterbury's Trial, 16 How. St. Tr. 495, Commonwealth v. Dana, 2 Met. C. (Mass.) 329; Commonwealth v. Tibbets, 157 Mass. 519; People v. Adams, 176 N. Y. 351, and there are many cases to be found in the books where the Federal courts have recognized this rule. Stockwell v. United States, Fed. Cas. No. 13466, Adams v. N. Y., 192 U. S. 585; Hartman v. United States, 168 Fed. 30 (C. C. A.); Ripper v. United States, 178 Fed. 24 (C. C. A.); Lyman v. United States, 241 Fed. 954 (C. C. A.); Weeks v. United States, supra. It can no longer be doubted that

when the evidence results from the activities of those representing the government, the federal courts will not adhere to this ancient rule, but will inquire into the legality of those activities. Boyd v. United States, supra; Weeks v. United States, supra; Silverthorne Lumber Company v. United States, supra; Gouled v. United States, 255 U. S. 298; Amos v. United States, 255 U. S. 313; Byars v. United States, 47 Sup. Ct. Rep. 248; Sneider v. United States, 285 Fed. 1 (C. C. A.); Giles v. United States, 284 Fed. 208, especially if the defendant seasonably moves to have the evidence excluded or suppressed; Weeks v. United States, supra; Lyman v. United States, supra; Lum Yan v. United States, 193 Fed. 970 (C. C. A.); Youngblood v. United States, 266 Fed. 795 (C. C. A.)."

The same distinction is noted by Judge Rudkin in his dissenting opinion in the C. C. A. as follows:

"Here we are concerned with neither eavesdroppers nor thieves, nor are we concerned with the acts of private individuals, or the acts of municipal or state officers. We are concerned only with the acts of Federal agents, whose powers are limited and controlled by the Constitution of the United States."

III.

It was urged by the government that the "tapping" of a private telephone wire and listening in to conversations passing over such wire is not a search or seizure and hence not within the operation of

the Fourth and Fifth Amendments. The case of *Boyd v. United States, supra*, decides that point for us. Not only does it decide that point but it *rules this case*. The *Boyd* case was not a search and seizure case. It lays down search and seizure law, and nothing but search and seizure law, but it involved neither a search nor a seizure. Congress had passed an act providing that where an invoice or paper needed by the government in the prosecution of libels for the forfeiture of goods brought in in violation of the customs acts and regulations was in the possession of the defendant, the attorney for the government might make a motion describing the paper and setting forth what he expected to prove therefrom; and upon that motion the court might issue a notice to such defendant to produce the paper at the time of hearing. The penalty prescribed in the act for a noncompliance with the notice was that the allegations contained in the moving papers should be taken as confessed. The government had instituted proceedings to forfeit thirty-five cases of plate glass. In the proceedings Boyd became the claimant. A motion was made pursuant to this act and a notice issued to Boyd to produce a certain invoice at the hearing. Boyd complied, but under protest, saving his rights. The goods were forfeited. Boyd carried the proceedings to the Supreme Court. That was not search and seizure.

but these proceedings for the first time in the history of the court presented the question whether or not the government could compel a citizen to become an *unwilling* source of the evidence that would forfeit his property or convict him of crime. The court was determined that such a principle should never become engrafted upon the law of the land. They decided that before they wrote the opinion. A study of the facts in the decision reveals that thought. It was an act of Congress that had made possible the situation confronting the court. An act of Congress is the supreme law of the land, except the Constitution, which ranks it. To the Constitution then they looked. The only provisions there found that could be said to bear upon the situation were the Fourth and Fifth Amendments; the one prohibiting unlawful search and seizure, the other declaring that no person shall be compelled *in a criminal case* to be a witness against himself. But the proceeding before them was not a criminal proceeding; and the act in question saved an exception to applying it in criminal cases. The court got over that difficulty by saying: "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him though they may be civil in form are in their nature criminal." Next, it was not an instance of search or

seizure either, but the court reasoned it into one by showing the operation of the motion and notice to be the same in effect as a search and seizure; which the court deemed sufficient. Having brought the proceedings within the operation of the amendments, it then proceeded to lay down search and seizure law.

In *Silverthorne Lumber Company v. United States*, 251 U. S. 385, the case was ruled by application of the Fourth Amendment, but it was not a search and seizure case either. The government had made an unlawful search and seizure of the defendant's papers and had been forced by the lower court to return them. It then caused a subpoena to be issued and served upon the defendant to produce them. He refused and was fined and imprisoned for contempt. Upon appeal to the Supreme Court, it was held that the proceedings was an attempt to do indirectly what the government could not do directly.

In *Gouled v. United States, supra*, a party in the employ of the Intelligence Department of the United States Army in the guise of a social call had surreptitiously taken a paper from the office of the defendant. This is not a search and seizure as these words are employed in legal parlance, but the case was ruled by search and seizure law and application of the Fourth and Fifth Amendments.

Consequently, it is not necessary that the act complained of be strictly a search or seizure, if the effect of the act be to compel a man to furnish the evidence to convict himself of crime, and that the act be one of governmental agency.

The same thought is advanced by this court in a late decision, the *Village of Euclid v. Ambler Realty Company*, 47 Sup. Ct. Rep. 114 (not officially reported), as follows:

"While the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

IV.

In the *Boyd* case, *supra*, it is said:

"The principles laid down in this (Lord Camden's) opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; *they apply to all invasions on the part of the government and its employees on the sanctity of a man's home and the privacies of life.*" (Italics ours.)

These principles then apply to "all invasions on the privacies of life." No exact definition of this

term has been found, but obviously it is a comprehensive term and surely includes the right to be let alone. Webster's Dictionary defines "privacy" as follows:

1. State of being in retirement from the company or observation of others; seclusion.

2. A place of seclusion from company or observation; retreat; solitude; retirement.

3. Concealment of what is said or done; secrecy.

4. A private, personal or secret matter.

If one has engaged a telephone from a public service corporation, that telephone is his against all the world except the company, and it is his against the company, too, if all tolls are paid. The right to the exclusive enjoyment of that telephone free of interference from anybody is a right of privacy. No government agent has a right to interpose an earpiece upon it any more than he has a right to raise the curtain and peek through another's window. If two persons are conversing together in a room of one of them, an intrusion therein by a government agent secretly is an intrusion upon their right of privacy. Is it any the less so if they are in separate rooms connected by a telephone and some interloper "listens in" by means of "tapping" upon the wire? Such conduct constitutes an invasion on the privacies of life and when done by a government agent falls within the

condemnation of the *Boyd* case, and evidence thereby secured is inadmissible for the purpose of securing a conviction in a criminal case. As was aptly said by Judge Rudkin in his able dissenting opinion herein:

"A person using the telegraph or telephone is not broadcasting to the world. His conversation is concealed from the public as completely as the nature of the instrumentalities employed will permit, and no Federal officer or Federal agent has a right to take his message from the wires, in order that it may be used against him. Such a situation would be deplorable and intolerable, to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages interrupted and intercepted in this way? Must their personal, private and confidential communications to family, friends and business associates pass through any such scrutiny on the part of agents in whose selection they have no choice, and for the faithful performance of whose duties they have no security; agents, whose very names and official stations are in many instances concealed from them? If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity." (R. 772-9.)

V.

The majority opinion of the C. C. A. relies for support on *State v. Hester*, 134 S. E. Rep. 885 (S. C.), and *Adams v. N. Y.*, 192 U. S. 585. Neither of these

cases supports the text. In the case of *State v. Hester*, three defendants under indictment were lodged in a cell and their conversation overheard by the use of a dictaphone. The conversation so overheard was admitted by the trial court, and this action was sustained on appeal, not because of any constitutional limitation or inhibition, for no such question was raised, but because the evidence failed to establish that they had been entrapped by the authorities.

The *Adams* case has been limited and qualified by this court in a recent decision, *Marron v. United States*, 48 Sup. Ct. Rep. 74 (not officially reported). Referring to that case, this court says:

"The government relies on Adams v. New York, 192 U. S. 585. That was a prosecution in a state court. It involved no search or seizure under the law, or by an officer of the United States. The Court of Appeals, in People v. Adams, 176 N. Y. 351, held that the provisions of the Federal Constitution did not apply; that the use of the private papers as evidence did not violate the state Constitution; declaring that it expressed no opinion as to the seizure, and applied the rule that a court when engaged in trying a criminal case will not take notice of the manner in which the witness obtained papers offered in evidence. And this court assuming, without deciding, that the Fourth and Fifth Amendments were applicable, held the use of the private papers as evidence did not violate any right safeguarded by these amendments, and after reference to the procedure at the trial declared that,

'the court did not stop to inquire as to the means by which the evidence was obtained,' but the court did not decide whether the seizure violated the Fourth Amendment. It decided that the admission in evidence of the private papers did not infringe the Fourth or Fifth Amendments. The case does not support the government's contention. See Weeks v. United States, supra; Silverthorne Lumber Company v. United States, 251 U. S. 385; Agnello v. United States, supra."

CONCLUSION

We respectfully submit that the judgment of the Circuit Court of Appeals herein should be reversed and this case remanded to the trial court for a new trial.

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